SOGELEASE ADVANCE (MALAYSIA) SDN BHD

v.

JANTSCO SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAJ J
[CIVIL APPEAL NO: R1-12-421-98]
27 FEBRUARY 2001

CONTRACT: *Interest - Overdue payment - Whether excessive - Whether a penalty interest caught by s. 75 Contracts Act 1950*

The appellant and the first respondent entered into three identical hire-purchase agreements for the hire of certain goods. The second, third and fourth respondents were the guarantors under the agreements. Clause 9 of each of the agreements provided for late charges, *ie*, the first respondent was liable to pay interest for overdue instalments. The first respondent defaulted in his instalments and when he was sued for late charges, he disputed liability.

The Sessions Court dismissed the appellant's claim for late charges on the basis that cl. 9 of the said agreements was a penalty clause caught by s. 75 of the Contracts Act 1950. Accordingly, the appellant's claim against the second, third and fourth respondents was also dismissed. Hence, this appeal.

Held:

[1] The interest for late charges was an agreed term between the appellant and the first respondent.The rate was not only fixed, but it was charged from the date of default and not from the date of the agreements.

[1b] It was not as though the appellant had a right to impose interest for late payments and that the interest rate was fixed at the time of default unilaterally. The appellant itself had to pay interest on the amount advanced for purchase of goods and that was not challenged. Also, the rate was not shown to be excessive. As such, the appellant was entitled for the late charges as claimed against the first respondent. It followed that the second, third and fourth respondents were liable on their guarantee and indemnity.

[Appeal allowed.]

Case(s) referred to:

Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd [2000] 1 CLJ 346 ***(refd)***

Realvest Properties Sdn Bhd v. Co-operative Central Bank Ltd [1996] 3 CLJ 823 ***(refd)***

Reliance Shipping & Travel Agencies Sdn Bhd v. Low Ban Siong [1996] 2 CLJ 960 ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 75

For the appellant - S Meera; M/s PM Tan, Chan & Partners
For the 2nd respondent - Norhafiza M Said; M/s Iza Ng Yeoh & Kit
For the 3rd & 4th respondent - S Suresh; M/s Fernandez & Selvarajah

Reported by Raja Vishnu

JUDGMENT

KC Vohrah J:

There were three hire-purchase agreements entered into between the appellant (the plaintiff in the court below) and the 1st respondent (the 1st defendant in the court below).

In these three agreements which had identical terms relating to rights and liabilities the 1st defendant promised to pay monthly instalments for the hire of certain goods. In the event of overdue amounts the 1st defendant had to pay late charges. Clause 9 of each of the agreements provided:

> Late Charges
>
> 9. Hirer shall pay interest as specified under Art 1V of the Schedule to the Agreement calculated on a daily basis on any monies payable hereunder which may from time to time be overdue by Hirer.
>
> Part IV – Late Charges
>
> Interest Rate for Calculating Late Charges:
>
> 0.05 % per day.

So far as the 2nd, 3rd and 4th defendants are concerned each of them signed a guarantee and indemnity agreement guaranteeing the payment of all sums due under the three agreements.

The 1st defendant defaulted in his payments under all three agreements and when sued for RM61,065.70 on late charges under the agreements by the plaintiff the 1st defendant disputed liability to pay the late charges. The 2nd defendant also disputed liability to pay late charges. The 3rd and 4th defendant's defence was that they had not received copies of the said hire purchase agreements and the guarantee and indemnity and that the plaintiff had contravened provisions of the Hire-Purchase Act 1967.

Evidence in the court below for the plaintiff was given by SP1, a senior collection officer of the plaintiff company. He referred to the three agreements and to the identical clause therein relating to late charges. While instalment payments under the three agreements had been made they were made late and the claim was for late charges. He said the defendants did not object to the late charges. He justified the fixed rate for overdue payments at 0.05% per day (which amounted to 18.25% per year) as the risk the defendant had to take over overdue amounts when the plaintiff had paid out on their behalf to buy the goods from the 1st defendant and the fact that the plaintiff had to pay bank interest for the money. There was no evidence of the actual loss incurred by the plaintiff.

SP1 was not cross-examined by counsel for the 2nd defendant as to non-receipt of notices of demand.

SP1 was not cross-examined by counsel for the 3rd and 4th defendants that they did not receive copies of the agreements. SP1 stated in cross-examination that notices of demand for the late charges were sent to all the defendants.

The defendants did not call any evidence. The Sessions Court dismissed the claim of the plaintiff holding that the interest charged under cl. 9 of the said agreements (on late charges) was a penalty caught by s. 75 of the Contracts Act 1950 and that since the plaintiff had failed to prove its loss the defendant was not entitled to the amount claimed. Accordingly he held that since the plaintiff had failed to prove its claim against the 1st defendant the claim against the 2nd, 3rd and 4th defendants perforce had to fail. He, however, held that he was satisfied that the notice of demand on the late charges had been properly sent to the 2nd to 4th defendants.

The Sessions Court judge in dismissing the claims for the late charges saying that there was no proof of damages under s. 75 of the Contracts Act 1950 obviously relied principally on the case of *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374 on the interpretation of the said s. 75 which both counsel for the defendants had cited.

The Federal Court case of *Selva Kumar* where s. 75 of the Contracts Act 1950 was given "a restricted construction rather than a literal one" stated that a plaintiff who seeks to recover damages for the actual damage caused ought to prove the damages unless he is content with the symbolic award of nominal damages. The court held the words "whether or not actual damage was proved to have been caused thereby" in s. 75 "are limited to those cases where the court would find it difficult to assess damages for the actual damage or loss as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove damages or the reasonable compensation or loss in the usual ways." I am aware that shortly after that case the case of *Realvest Properties Sdn Bhd v. Co-operative Central Bank Ltd* [1996] 3 CLJ 823 was decided by the Federal Court where *Selva Kumar* was discussed.

These two 1996 cases relating to the application of s. 75 must have been in the mind of the Court of Appeal (although they are not cited in the judgment of the court) when in the year 2000 in the case of *Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd* [2000] 1 CLJ 346 the Court of Appeal decided that to bring increased or penalty interest within the ambit of s. 75 it must first be shown that the interest or penalty was excessive in nature. Siti Norma Yaakob JCA who had previously given the judgment of the Court of Appeal in *Reliance Shipping & Travel Agencies Sdn Bhd v. Low Ban Siong* [1996] 2 CLJ 960 and had considered the said s. 75 in the context of *Selva Kumar* and the facts of the case and was therefore fully aware of *Selva Kumar* had this to say, at 358:

> As no part of the balance of the purchase price had been paid at all by the respondent, I cannot see how it can object to the imposition of 13% interest as that was the rate of interest agreed upon default under para (b) of the Second Schedule. Likewise the imposition of 19% interest on the arrears of instalments as that rate of interest is allowed by s. 5.16 of the agreement. Perhaps the only issue is whether the increased interest at 19% per annum is caught by s. 75 of the Contracts Act 1950.
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> ...
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> To bring that increased or penalty interest within the ambit of s. 75, it must first be shown that it was excessive in nature. The fact that it was an agreed penalty interest as opposed to one that was fixed unilaterally by the appellant, lends support to my conclusion that it could not have been that excessive to enable the respondent to agree to that rate of interest to be charged. On that reasoning the respondent cannot now be heard to complain that the rate of 19% per annum on all instalments due as at 30 June 1990, is excessive and under those circumstances that the rate of interest cannot be caught by s. 75.

> I am aware that the 'Explanation' to s. 75 prescribes such a promise to pay increased interest to be a penalty but I hasten to add that the language used in the 'Explanation' is not mandatory in nature as the legislature preferred the word 'may' as opposed to 'shall'. Under such circumstances I consider that every promise to pay increased interest has to be identified and evaluated before a determination can be reached whether such a promise falls within the situation as envisaged by the 'Explanation' in s. 75.

In our case the interest claimed for late delivery is an agreed term between the plaintiff and the 1st defendant and the rate was fixed. It was not as though the plaintiff had a right to impose interest for late payments and the interest rate was at large to be fixed at the time of default unilaterally. Not only was the rate fixed, it was not charged from the date of the agreements but from the date of default. The explanation by the plaintiffs' witness was that the plaintiff itself had to pay interest on the amount advanced for purchase of goods and this was not challenged. And the rate has not been shown to be excessive. As I see it the plaintiff is entitled for the late payment charges as claimed against the 1st defendant.

The 2nd, 3rd and 4th defendants during the trial only disputed that the notice of demand was sent to them. The judge held otherwise.

In the circumstances the 2nd 3rd and 4th defendants are liable on their guarantee and indemnity.

The appeal is allowed against all the defendants. Costs here and below.